

2001

Jeroldene Bailey v. Randee Bayles : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

JEROLDENE BAILEY,)	
)	Utah Supreme Court # 20010304
)	
Petitioner-Appellee,)	
)	Utah Ct. Appeals # 990765-CA
vs.)	
)	
)	Seventh District Court # 9847-44
)	
RANDEE BAYLES,)	
)	Priority # 15
Respondent-Appellant.)	

REPLY BRIEF OF RANDEE BAYLES, APPELLANT

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- Hoffman, Jonathan A., "By the Course of Law: The Origins of the Open Courts Clause of the State Constitutions," 74 Or. L. Rev. 1279 (Winter, 1995). 15

Argument

After trial, the findings made by the trial court were inadequate to justify the legal conclusion that Appellant Bayles had been stalking Appellee Bailey. No effort was made by Appellee Bailey to seek clarification of the findings or request a new trial. Appellee Bailey did not argue to the Court of Appeals that an alternate justification in fact or law merited affirmance of the trial court. Thus, many of the situations when “affirm on any ground” or “equitable review” has been properly applied do not apply in this case.

In addition, Appellee Bailey’s arguments fail to demonstrate that while affirming on alternate grounds the Court of Appeals provided to Appellant Bayles either (1) the procedural protections afforded by Article I § 7 and the Fourteenth Amendment to the United States¹ Constitution, or (2) the substantive protections required by the provisions of Article I § 11 of the Utah Constitution. Having failed to do both, the Court of Appeals’ decision should be vacated and instructions given to direct that the trial court opinion also be vacated.

I. Legal and Equitable Precedent Allowing Appellate Affirmance Do Not Apply to This Case

The re-interpretation and re-application by the court of appeals of alleged facts and argument presented to the trial court is not justified by standard legal doctrines or practice. As such, the first three arguments presented by Appellee Bailey do not have merit.

A. Court of Appeals Affirmance Is Not Justified Under Existing Doctrines Allowing for Legal and Equitable Affirmance on Any Grounds

Whether based on affirmance on any ground, re-finding of facts for equitable reasons, or proper application of the existing precedent of Strollo v. Strollo,¹ the affirmance of the court of appeals is erroneous.

1. “Affirm on Any Ground” As A Matter of Law

The doctrine of appellate “affirm on any ground” has been applied in Utah jurisprudence in many different types of situations. The doctrine has been applied where the trial court made legal rulings on motions for summary judgment² or motions to dismiss.³ Other opinions have affirmed on alternate legal grounds when the trial court findings established the factual foundation for the legal determination,⁴

¹ 828 P.2d 532 (Utah Ct. App. 1992)

²DeBry v. Noble, 889 P.2d 428 (Utah 1995); Allphin Realty, Inc. v. Sine, 595 P.2d 860 (Utah 1979).

³ O’Neal v. Division of Family Services, 821 P.2d 1139, 1141 (Utah 1991).

⁴ Buhner Block Company v. BUWC Associates, 752 P.2d 892, 895 (Utah 1988) (interpretation of an integrated, non-ambiguous contract provision); Rice, Melby Enterprises, Inc. v. Salt Lake County, 646 P.2d 696, 698 & n. 3 (Utah 1982).

the alternate ground for affirmance was “apparent in the record and was briefed and argued by the parties on appeal,”⁵ or the appellate court had a “complete factual record before [them], and defendants’ arguments raise purely legal questions.”⁶

The mainstay opinion used by the court of Appeals was Strollo v. Strollo.⁷ This was an opinion that ruled as a matter of law on uncontested factual allegations in a complaint because the trial judge had granted a motion to dismiss the complaint. As noted in Appellant Bayles’ opening brief, because the court of appeals re-interpreted and applied alleged facts that were not found to be satisfied by a preponderance of the evidence by the trial before the trial court, (Opening Brief at pages 7-11), affirming on alternate legal grounds when undisputed factual claims are present does not apply to this case.

2. Re-Interpreting Factual Claims in Equitable Cases

When dealing with equitable claims,

[i]t is true that in cases of equity this Court *may* weigh the evidence and determine the facts. However, it is well established in our decisional law that due to the advantaged position of the trial court, there is indulged a presumption of correctness of the findings and judgment; and that where the evidence may conflict we do not upset the lower court’s findings unless the evidence clearly preponderates against them.⁸

⁵ Dipoma v. McPhie, 2001 UT 61 ¶ 18, 426 Utah Adv. Rep. 17 (2001).

⁶ Utah v. Finalyson, 2001 UT 10 ¶ 31, 994 P.2d 1243 (2000).

⁷ 828 P.2d 532 (Utah Ct. App. 1992).

⁸ Ovard v. Cannon, 600 P.2d 1246, 1248 (Utah 1979).

It is inappropriate in most instances for an appellate court to disregard the trial court's findings of fact and conclusions of law and to assume the task of weighing evidence and making its own findings of fact. The appellate court is entrusted with ensuring legal accuracy and uniformity and should defer to the trial court on factual matters. . . .In certain instances, the appellate court may exercise equitable powers and take upon itself the responsibility of weighing the evidence and making its own findings of fact. . . .However, this exception must not become merely a guise under which an appellate court substitutes its own judgment for that of the trial court. The appellate court must have a valid reason to take this extraordinary step and then only when the appellate court is in an equal position with the trial court with respect to the facts and evidence at issue.⁹

The appellate court does

not engage in a review of the evidence which duplicates the task of the trial court. Rather, we assess the quality and quantity of the evidence to determine if it "clearly preponderates" against the trial court's finding that the appropriate standard of proof has been satisfied.¹⁰

An appellate court is "not at liberty to reject the trial court's rulings only on the basis of an unsubstantiated belief that the finding is inaccurate."¹¹

The court of appeals has not established why its was necessary to take an "extraordinary step" of re-weighing the evidence presented to the trial court, especially when no claim was made by Appellee Bailey that the findings of fact of the trial court were erroneous or lacking. Furthermore, since it claimed that it was

⁹ Willey v. Willey, 951 P.2d 226, 230-31 (Utah 1997).

¹⁰ Estate of Hock v. Zion's First National Bank, 655 P.2d 1111, 1114 & n. 1 (Utah 1982) (emphasis in original.)

¹¹ Richard Barton Enterprises, Inc. v. Tsern, 928 P.2d 368, 380 (Utah 1996).

relying on “specific findings or undisputed evidence,”¹² it can not claim the benefit of making its own equitable findings.

3. Stollo v. Stollo¹³ Was Erroneously Applied to Affirm the Trial Court

The majority panel of the court of appeals used the precedent of Stollo v. Stollo to recast the trial court’s findings of fact and the application of law to affirm the trial court on alternate grounds. There is conflicting precedent regarding whether or not an Appellee may raise “an argument in defense of the lower court’s judgment when the argument was not presented in the lower court”.¹⁴ If this Court were to find that the legal argument must have been raised in the lower court, the use of Stollo v. Stollo to recast the facts and law in the case brought by Appellee Bailey was in error because of the context in which it was raised in the trial court.

Stollo v. Stollo focused on whether or not a preliminary injunction should have been issued under the Cohabitant Abuse Act.¹⁵ The case had been dismissed because the trial judge had not found there to be “eminent harm” even though there were allegations that the spouse had been beaten for eight and one-half years and was in fear of further harm. The most recent abuse had occurred approximately

¹² Bailey v. Bayles, 2001 UT App 34, ¶ 10, 18 P.3d 1129 (2001).

¹³ 828 P.2d 532 (Utah Ct. App. 1992)

¹⁴ State v. South, 924 P.2d 354, 355 & n.3 (1996); State v. Montoya, 937 P.2d 145, 149-50 (Utah Ct. App. 1997).

¹⁵ Utah Code Ann. §§ 30-6-1 to -11 (1989 & Supp 1991).

eight months earlier and required the spouse to seek medical care and residence in a shelter. Approximately one month before the filing, the spouse seeking relief had been threatened with death if a divorce was sought. The trial court's denial of the initial request was error because "[t]he statute clearly protects those who are reasonably in fear of physical harm resulting from past conduct coupled with present threat of future harm."¹⁶

For at least six reasons, the precedent of Strollo v. Strollo to re-frame facts and legal issues. First, the Strollo case was appealed on the basis of a motion to dismiss; hence, all allegations made had to be taken as being true. In this case, the appeal arose from a hotly disputed trial in the context of determining whether or not the already stipulated to preliminary order would be made permanent. Second, the claimed urgency of needed physical protection – threatened death one month previous – is absent. Both the original petition and argument of counsel indicated that no physical abuse had occurred since 1994, five years before the trial.¹⁷ It was uncontested that in the parties divorce proceeding, a mutual restraining order had been lifted eleven months prior to the filing of the protective order.¹⁸ Third, no evidence was ever alleged or introduced showed Appellant Bailey had been to any

¹⁶ Strollo v. Strollo, *supra*, 828 P.2d at 534-45.

¹⁷ Record 168 at page 466, lines 7-14 (Counsel for Appellant Bayles); page 496, line 24 - page 497, line 2 (Counsel for Appellee Bailey.)

¹⁸ Record 168, pg. 475, line 21 - page 476, line 8.

shelter or medical treatment had been obtained by Appellee Bailey because of the conduct of Appellant Bailey.¹⁹ Fourth, some 1991 of the out-of-state precedent relied upon by the appellate court and Appellee Bailey in closing argument²⁰ that defined abuse as including acts that would cause another to be “worried, anxious, or uncomfortable,”²¹ a doctrine that appears to be contrary to the precedent of Salt Lake City v. Lopez²² and related precedent requiring that emotional stress be shown by either physical symptoms or mental illness.²³ Fifth, in closing argument, Appellee Bailey presented Strollo v. Strollo in the context of the stalking statute and Salt Lake City v. Lopez opinion. The argument was made that when there has been an abusive marriage over time, the totality of the situation must be examined, likely lending itself to a subjective rather than objective (“reasonable person”) standard for determining whether or not emotional distress occurred.²⁴ Sixth, not only were no

¹⁹ “[T]he court did not find. . .that plaintiff [Bayles] suffered from more than anxiety or annoyance, perhaps because plaintiff put on no objective evidence thereof.” Bailey v. Bayles, 2001 UT App 34, ¶ 27, 18 P.3d 1129, 1136 (Davis, J., dissenting.)

²⁰ Record 168, page 480, lines 17-22.

²¹ See, In re Marriage of Blistein, 212 Ill. App. 3d 124, 155 Ill. Dec. 746, 569 N.E.2d 1357 (1991), cited in Strollo v. Strollo, supra, at 534 & n.2.

²² 935 P.2d 1259, 1264 (Utah Ct. App. 1997).

²³ Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 973-75 (Utah 1993); Record 168, at page 454, line 19 - page 455, line 19.

²⁴ Record 168, page 479, line 11 - 486, line 20. Counsel for Appellee Bailey indicated that the court of appeals was “saying look at everything, look at it in its

“extraordinary circumstances” present to justify an equitable re-weighing of factual matters before the trial court, the court of appeals was not in the same position of the trial court judge who saw and observed the demeanor of witnesses and the quality of other evidence submitted.²⁵

**B. The Justifications Offered By Appellee Bailey for Affirmance
By the Court of Appeals Are Without Merit**

Based on the foregoing arguments and the reasons that follow, the first three arguments raised in the Brief of Appellee Bailey must fail.

totality, and that way Strollo, I believe suggests that it's a subjective sort of response or a subjective sort of standard." Id., page 483, lines 2-5. However, it was also argued "I think that the Court has to look at that in some sense – I mean in some sense it is subjective and objective and I am (inaudible) the line, I realize that, but the Court has to decide that in order to apply to Cohabitant Abuse Act that there's some reasonableness to the person's fear. Because I don't think the could be in a position that said "Okay, all you have to come in and say is 'I'm afraid,' therefore you get this cohabitant abuse order on your side," because I think it would become unmanageable in many ways, this act has become unmanageable and has been misused. . . . I think it just becomes a difficult question, so I don't think the line is so easy to draw on the objective and subjective, and I realize I'm arguing inconsistently, but I don't think there's any other choice in these types of cases, because the Court has to make a determination." Id., page 483, line 23 - page 485, line 2. The nature of fear in the context of this case and State v. Lopez was also discussed. Id., page 485, line 13 - page 487, line 7.

²⁵ Willey v. Willey, 951 P.2d 226, 230-31 (Utah 1997). ("The appellate court must have a valid reason to take this extraordinary step and then only when the appellate court is in an equal position with the trial court with respect to the facts and evidence at issue.")

1. Appellate Court Affirming on Non-found Factual Findings Must Fail

As noted above, the court of appeals affirmed the trial court by giving weight and credibility to factual allegations in the petition that the trial court did not find were proven. A stipulation that certain evidence may be admitted is not a stipulation that it is accepted as being true; a trial court is to required to accept each piece of evidence as a proven fact just because it receives a statement regarding the same.²⁶ Contrary to the assertions of Appellant Bailey at page 12 of her brief, the issue is not whether the limited findings of the trial court were contradicted by the court of appeals novel findings of fact; rather, under Willey v. Willey, the issue is whether or not (1) there existed extraordinary circumstances to merit such action and (2) the appellate court was in the same position as the trial court to consider the evidence. Had the appellate case been decided on summary judgment, a motion to dismiss, stipulated facts, or solely on the findings made by the trial court, there could be possible justification for the action by the court of appeals. However, as there is not, the use of facts not found by a trial court must fail.

On pages 11-12 of her brief, Appellant Bailey claims that the findings of additional facts by the court of appeals was justified for at least three reasons. First, both Appellee and Appellant were at fault for not objecting to the trial court over insufficient findings of fact or asking for more specific findings of fact and conclusions of law. Second, since both parties and the court “went off on a tangent

²⁶ See Willey v. Willey, 951 P.2d 225, 231 (Utah 1997).

about elements of the criminal stalking statute,” it was proper for the court of appeals to clarify what is required as a matter of law to prevail under the Cohabitant Abuse Act. Third, being in a similar position to the trial court, its enlargement on factual findings was not improper. Upon closer examination, all three arguments fail.

In a proceeding seeking to establish the factual basis for a permanent protective order, the burden of proof is on the party seeking the injunction. A party seeking a permanent injunction carries the burden of ensuring that adequate findings of fact are made to justify a desired result legal conclusion. Especially when an opposing party has argued thoroughly the legal standard to be applied at the trial level, a failure of the trial court to find facts to support the same may be preserved as a tactical matter for an appeal.

The parties and the trial court focused at trial and on appeal on the standards of criminal stalking because that is the legal standard pled by Appellee Bailey in her opening petition.

Finally, since the factual allegations of the petition were at issue and hotly disputed at the trial court level,²⁷ the appellate court could not have been in the same position of the trial court as it related to weighing the credibility of the evidence and the witnesses. Without this, making an equitable re-determination of facts was in error.

²⁷ See Record 168, page 455 at line 20 - page 477, line 24 (summary of factual arguments presented by Counsel for Appellant Bayles.)

2. Appellate Court Affirming on Non-contextual Legal Grounds Must Fail

Appellee Bailey argued Strollo v. Strollo was argued to the trial court to define the nature of the “reasonableness of fear” as required by the criminal stalking statute.²⁸ At no time was Strollo v. Strollo used to argue at trial that the initial petition should be accepted at face value as evidence of “domestic abuse” and the permanent order issue. This leads to misuse of disputed evidence by the changing of the legal context in which it is admitted. Justice Davis observed his concern as follows:

Specifically, the majority’s affirmance of the trial court relies on evidence from the record, admitted in support of Bailey’s claim, and applies to a completely different claim. As a result, this court is reshaping the relevance and importance of evidence that was presented against Bayles by the earlier proceeding. Such an approach is improper in the present case because, had Bayles been aware that certain testimony was or would become determinative of the different case decided by the court of appeals, his trial strategy and/or arguments on appeal may have changed dramatically. Similarly, had the trial court heard the case now decided by the court of appeals and the evidence relied upon by the court of appeals in that context, its findings, conclusions, and rulings may have been totally different. . . . I am also troubled by the majority’s reliance on instances on abuse that allegedly occurred anywhere from four to twenty-five years before the petition for a protective order was filed. While the trial court relied on that evidence to support its conclusion relative to Bayles knowledge or constructive knowledge, the majority, without any opportunity for the parties or the trial court to address the issue, uses the evidence as direct evidence of a substantively different type of domestic violence.²⁹

²⁸ See Utah Code Ann. § 76-5-106.5 (1999); State v. Lopez, *supra*, 935 P.2d at 1264.

²⁹ Bailey v. Bayles, 2001 UT App 34, ¶ 19 & n.5, 18 P.3d 1129 (Utah Ct. App. 2001) (Davis, J., dissenting.)

3. The Trial Court Found Insufficient Factual Evidence to Uphold the Elements of Stalking

For reasons noted in the dissent of Justice Davis and the opening brief of Appellant Bayles, the factual findings of the trial court were insufficient to satisfy the elements of the stalking statute.³⁰

On page 14 of her brief, Appellee Bailey questions why “should anyone be forced to endure stalking until her psychological being is seriously damaged to the point where she needs psychological and/or medical intervention?” Overlooked are the facts that (1) this proof was only necessary because the trial court rejected the claim of Appellee Bailey that there was a reasonable fear of bodily harm and (2) the evidentiary burden as to emotional distress was well-established in existing case law that was specifically brought to the trial court’s attention and addressed by counsel for Appellee at the trial level.

While the majority panel of the court of appeals and Appellee Bailey may have wished that the trial court had made additional or different findings of fact, making statements of fact – even under oath – does not make them so as a matter of law in the absence of a determination by a trier of fact that they are so. Because the findings of fact of the trier of fact have failed to satisfy the statutory standard selected by Appellee Bailey in formulating her request for a temporary and permanent

³⁰ Bailey v. Bayles, supra, 2001 UT App 34, ¶¶ 25-28; Opening Brief of Randee Bayles, Appellant, pages 12-14.

protective order, a post-trial, post-appeal argument regarding the unfairness of the legal standard must fail.

II. The Conduct of the Court of Appeals Has Violated the Right of Appellant Bayles to Due Process of Law³¹

Appellee Bailey has correctly observed this Court has stated that the application of the appellate rule that allows affirmance on any ground, even when a trial court has relied on another ground, does “not deprive a party of due process.”³² Nonetheless, *sua sponte* consideration of issues not raised in the trial court below should be prohibited as a violation of due process.

In our judicial system, except in extraordinary circumstances which are not present here, all parties are entitled to notice that a particular issue is being considered by a court and an opportunity to present evidence and argument on that issue before decision.³³

“It has always been our policy to resolve doubts in favor of permitting parties to have their day in court on the merits of a controversy.”³⁴ “Because of these significant constitutional concerns, the courts generally strongly disfavor *sua sponte* consideration of arguments and issues not raised by either party, without the

³¹ No distinction is being made between the rights afforded by Article I § 7 of the Utah Constitution and that afforded by the XIV Amendment to the United States Constitution.

³² Debry v. Noble, 889 P.2d 428, 444 (Utah 1995).

³³ Plumb v. State, 809 P.2d 734, 743 (Utah 1990).

³⁴ Celebrity Club Incorporated vs. Utah Liquor Control Commission, 657 P.2d 1293, 1296 (Utah 1982).

adversely affected party receiving notice and being allowed to respond.”³⁵ Not only are federal and state constitutional due process rights at issue, but public policy issues that favor a vibrant adversary system as a means of finding legal truth, the reviewing role of appellate courts, and the requirements of various Rules of Appellate Procedure are also denigrated if *sua sponte* consideration of issues not raised on appeal are used to affirm a trial court’s result after different factual findings are made while applying the one’s made in a different legal context.³⁶

There does not appear to be any compelling or rational reason why the court of appeals could not have asked for additional briefing on the applicability of the law it chose to use or the correctness of the factual additions it made to the record. In the absence of such, Appellant Bailey was denied due process of law by the lack of procedures and means used by the majority of the court of appeals panel to issue its ruling in this case.

III. The Conduct of the Court of Appeals Has Violated the Right of Appellant Bayles to Due Course of Law

On page 16 of her brief, Appellee Bailey implies that the rights protected by Article I § 11 of the Utah Constitution are the same as those procedural rights afforded by the due process Article I § 7 of the Utah Constitution. This is in error.

³⁵ Crook, D. Scott, “Affirming the Untested – Affirming a Trial Court on Issues Raised Sua Sponte,” 14 Utah State Bar Journal 10, 12-13 (October 2001), and federal and state cases cited therein.

³⁶ Id. at 13-15.

Utah's Article I § 11 "open court" provisions guarantees "remedy by due course of law" for a citizens' "person, property, or reputation".

The meaning of section 11 must be taken not only from its history and plain language, but also from its functional relationship to other constitutional provisions. Section 11 and the Due Process Clause of Article I, Section 7 are related both in their historical origins and to some extent in their constitutional functions. To a degree, the two provisions are complementary and even overlap, but they are not wholly duplicative. Both act to restrict the powers of both courts and the Legislature.³⁷

From the outset, this Court recognized that the requirements of Article I § 11 applied to "judicial" acts;³⁸ more recently, this phrase has been interpreted to "guarantee access to the courts and a judicial procedure that is based on fairness and equity."³⁹ Application of this protections provided by this phrase "due course of law" to the judiciary is in accordance with the initial inclusion of the provisions in early American state constitutions to preserve an independent judiciary.⁴⁰

In 1993, the Utah Court of Appeals reviewed a legislatively enacted ninety-day time limit for filing a writ of habeas corpus under the provisions of Article I § 11.⁴¹ The

³⁷ Berry v. Beech Aircraft Corp., 717 P.2d 670, 675 (Utah 1985).

³⁸ Industrial Commission of Utah v. Evans, 52 Utah 394, 409, 174 P. 825, 831 (1918).

³⁹ Jefferies v. Stubbs, 970 P.2d 1234, 1250 (Utah 1998), cert. denied 526 U.S. 1130, 119 S.Ct. 1803, 143 L.Ed.2d 1007 (1999).

⁴⁰ See Hoffman, Jonathan, "By the Course of Law: The Origins of the Open Courts Clause of the State Constitutions," 74 Or. L. Rev. 1279 (Winter, 1995).

⁴¹ Currier v. Holden, 862 P.2d 1357 (Utah Ct. App. 1993).

Court of Appeals examined the effect of a ninety-day statute of limitations on filing the writ of habeas corpus to determine “(1) the degree to which a statute impairs an individual’s rights to seek a remedy and (2) the nature of the right impaired.”⁴² Having found the rights impaired were expressly protected by provisions of the Utah Constitution, the court of appeals found that the challenged conduct required “higher scrutiny than minimal deferential review and demand more than a determination that a statute does not represent a “case[] of extreme arbitrariness.”⁴³

In his opening brief, Appellant Bayles pointed out that the provisions of Article VIII §§ 1 and 5 the Utah Constitution provide that district courts shall be “trial courts” and have “original jurisdiction except as limited by the constitution or statute”. (Opening Brief at 18.) As these rights define the beginning point of the entire judicial proceeding – a proceeding to be “based on fairness and equity” – a higher standard than simple deference or presumption of constitutionality must be applied to the conduct of the court of appeals in this case.

The court of appeals has not articulated a reason why it was required to address issues in this appeal *sua sponte*, why it could enlarge on disputed facts to create more factual findings, or why it applied a legal standard not disclosed in the petition for relief or argued on appeal. Without articulated justification, when compared with the constitutional right to have evidence evaluated and decided by a

⁴² *Id.* at 1363.

⁴³ *Id.* at 1365.

trial court, it is improper to presume that the conduct of the majority of the panel is constitutional under Article I § 11 of the Utah Constitution. Because the conduct of the court of appeals regarding factual findings and applying legal argument in a context was made when it was never argued or decided before the trial court,⁴⁴ (regardless of whether the court of appeals had requested argument before it acted sua sponte,) the court of appeals acted unreasonably when its conduct is juxtaposed against the requirements of “due course of law” and the protections afforded those citizens receiving a trial court under Article VIII §§ 1 and 5 of the Utah Constitution.

Conclusion

Legal and equitable precedent allowing affirmance of a trial court’s action on “any ground” do not apply to this case. Affirmance on legal grounds when there is no conflict in facts does not apply to this case. Affirmance on a re-interpretation of facts in a case of equity does not apply because the court of appeals claimed they were relying on facts that were undisputed or found by the trial court. The precedent of Strollo v. Strollo was misapplied to this case for a number of reasons.

Justifications offered by Appellee Bailey for the conduct of the court of appeals must fail. The finding of alternate, supplementary facts fails when there has been no

⁴⁴ Even if it was presumed that the granting of a preliminary injunction was based on the court of appeals’ newly found factual and legal claims, the substitution of any such analysis with the final findings of fact and conclusions would obviate the ability to use what was interpreted by appellate justices as being a finding by the trial court. See Smith v. DeNiro, 25 Utah2d 294, 296, 480 P.2d 480, 481 (1971).

showing of an “extraordinary” circumstances to merit such an action or that the court of appeals could evaluate the (disputed) evidence as did the trial court. While the precedent of Stollo v. Stollo was used in one context of legal argument in the trial court, the appellate court applied the legal precedent in a completely different legal context, which in turn gave a different emphasis and cast to evidence found and that submitted in the trial court. Under these facts, no legal argument (as used by the Court of Appeals) was made. Finally, the findings of the trial court do not adequately demonstrate under statutory requirements and existing case law that Appellant Bayles engaged in stalking Appellee Bailey.

The sua sponte conduct of the court of appeals – without notice to either of the parties on appeal – denied Appellant Bayles his right to due process of law under the Utah and United States Constitution. There were no extraordinary conditions that justified refusing to allow the parties to comment on new factual findings and legal arguments made by the court of appeals that neither party made in the trial court or to the court of appeals. To allow the same not only violates constitutional due process provisions, but denigrates judicial policies favoring a strong adversary system, the reviewing role of appellate courts, and the requirements of the Rules of Appellate Procedure.

Even if the court of appeals had given notice to the parties of its intended course of action and asked for supplemental briefing, the rights of Appellant Bailey to “due course of law” under Article I § 11 of the Utah Constitution would have been

denied. Article VIII §§ 1 and 5 of the Utah Constitution protect the original jurisdiction of a district courts, a “trial court,” except as limited by the constitution or statute. Applying the provisions of Article I § 11 to create a judicial procedure based on “fairness and equity,” requires at least a higher scrutiny than minimal review when judicial conduct interferes with a citizen’s right to protect his “person, property, or reputation” in state courts. No rationale was provided by the court of appeals to infringe on the rights of Appellant Bayles; hence, the reasonableness of the conduct must fail. By failing, the affirming conduct of the court of appeals violated Article I § 11 must be struck down.

Because the trial court’s decision failed to satisfy the statutory requirements for stalking, and the court of appeals’ affirmance of the same must be struck down, the granting of a permanent protective order against Appellant Bayles must be reversed.

DATED and EXECUTED this 3rd day of December, 2001.

A handwritten signature in black ink, appearing to read "Matthew Hilton", written over a horizontal line.

Matthew Hilton of Matthew Hilton, P.C.
Attorney for Randy Bayles, Appellant

Mailing Certificate

I hereby certify that on the 3rd day of December, 2001, I placed in the United States mail, first class, postage pre-paid, two copies of the foregoing REPLY BRIEF OF RANDEE BAYLES, APPELLANT, addressed to the following persons:

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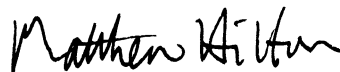
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and ten originals addressed to the following:

Pat Bartholomew, Clerk of the Court
Utah Supreme Court
450 South State Street
P.O. Box 140210
Salt Lake City, UT 84114-0210

DATED and EXECUTED this 3rd day of December, 2001.



Matthew Hilton of Matthew Hilton, PC
Attorney for Randee Bayles, Appellant